IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 29, 2005

STATE OF TENNESSEE v. NATHANIEL ROBINSON, JR.

Appeal from the Criminal Court for Sullivan County
No. S46,319 R. Jerry Beck, Judge

No. E2004-02191-CCA-R3-CD - Filed September 19, 2005

The defendant, Nathaniel Robinson, Jr., stands convicted of driving under the influence (DUI), third offense and driving on a revoked license, second or subsequent offense. For these convictions, the trial court imposed two consecutive sentences of 11 months and 29 days. The court ordered that the sentence for driving on a revoked license be suspended upon service of the sentence for driving under the influence; that the defendant be eligible for release after 75 percent service; and that fines imposed by the jury be reduced to $1,000 for each offense. After the defendant's motion for a new trial was denied, he timely filed a notice of appeal. On appeal, he challenges the validity of a pretrial hearing, the denial of a motion to dismiss, jury instructions on the state's duty to preserve evidence, and the denial of alternative sentencing. Following our review, we affirm the judgments of the lower court.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Stephen M. Wallace, District Public Defender; and Terry Jordan, Assistant District Public Defender, for the Appellant, Nathaniel Robinson, Jr.

Paul G. Summers, Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and B. Todd Martin, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On the morning of November 11, 2001, Officer Jason McClain of the Kingsport Police Department observed the defendant driving a maroon Nissan. Officer McClain was familiar

with the defendant and the status of his driving privileges. Thus, Officer McClain followed the defendant until he parked at a nearby apartment complex. He then asked the defendant to exit his vehicle. At this time, Officer McClain observed that the defendant's speech was slurred, that his eyes were red and bloodshot and that "[h]e had some upper body sway about his person."

Officer McClain then asked the defendant to perform two field sobriety tests. The defendant was asked "to say his ABCs starting with the letter E and stopping with the letter X . . . ." The defendant was also required to do "the finger count, one, two, three, four, four, three, two, one." Officer McClain reported that the defendant was unable to perform these tests. Based on these results, he opined that the defendant was under the influence of alcohol and arrested him for this offense, as well as for driving on a revoked license.

At the Kingsport Police Department, Officer McClain administered a breath test to the defendant. By stipulation, both parties agreed that Officer McClain was certified to operate the intoximeter, which was tested and working properly. Officer McClain testified that he closely observed the defendant for 20 minutes before asking him to blow into the intoximeter machine. The results of the test, registering a blood alcohol level of 0.10 percent, were admitted into evidence.

The state also introduced certified copies of the defendant's driving record to show that the defendant's license was revoked on November 11, 2002. However, the state failed to preserve and produce video footage taken at the jail by VHS cameras that continuously ran in the booking area. Officer McClain confirmed that because the defendant agreed to take the intoximeter test, the tape was put back in the rotation and recorded over. At most, the recording was available for only three to four days.

Although the defendant moved to dismiss on grounds of destruction of exculpatory evidence, the court overruled this motion after determining that the destruction of the tape was not willful. The trial court did, however, find that an exculpatory evidence instruction was proper. After being charged by the trial court, the jury deliberated and returned a verdict of guilty as to driving under the influence, third offense, and driving on a revoked license, second or subsequent offense.

At the sentencing hearing, the defendant offered information about his poor health conditions and his prior service in the United States military. Additionally, the trial court considered a pre-sentence report, as well as the defendant's prior convictions, including three prior driving on a revoked driver's license convictions, two prior DUI convictions, and one theft under $500 conviction in Tennessee. Also, the defendant was convicted of driving on a suspended license in Texas. After considering the pre-sentence hearing report and the defendant's multiple convictions, the trial court sentenced the defendant to 11 months and 29 days for each offense, stating that the defendant was eligible for release after 75 percent service. The court ordered that the sentence for driving on a revoked license be suspended upon service of the sentence for driving under the influence. The court also imposed a $1,000 fine for each offense. All forms of alternative sentencing were denied, as was the defendant's motion for new trial.

I. Motion in Limine.

Before trial, the defendant moved to preclude the state from referring to the results of his intoximeter test prior to the results being accepted into evidence. In a pretrial conference, the trial court opined that *Sensing* objections to the admissibility of intoximeter test results would have to be raised in a pretrial motion and not reserved until the point in the trial when the test results are offered into evidence. *See State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992) (promulgating the proof of certain procedural requirements as a condition to admitting into evidence the results of certain intoximeter tests). In the face of this ruling, the defendant moved for and obtained a pretrial *Sensing* hearing. In the hearing, Officer Jason McClain testified about the intoximeter procedure, and the defendant presented no evidence in chief. The trial court overruled the *Sensing* motion, and the case proceeded to trial before a jury. Officer McClain was the first witness to testify. After describing the circumstances surrounding his detention and arrest of the defendant, he testified without further objection to the intoximeter procedure and the test results.

The defendant argues on appeal that the trial court erred in requiring a pretrial motion to contest the intoximeter procedure's compliance with *Sensing*. He relies upon *State v. Cook*, 9 S.W.3d 98 (Tenn. 1999), which indeed held that a defendant need not raise the *Sensing* objection prior to trial but may reserve the objection until the results are offered into evidence. *Cook*, 9 S.W.3d at 101-02. Although, on the authority of *Cook*, the trial court erroneously determined that the defendant must raise *Sensing* objections prior to trial or else suffer waiver, we nevertheless decline to reverse the defendant's convictions.

After ruling that a *Sensing* objection must be raised prior to trial, on the morning of trial the court afforded the defendant the opportunity to move to suppress the intoximeter test results. The defendant moved for suppression, and the court conducted a bench hearing. The state presented Officer McClain to establish compliance with *Sensing*. Defense counsel cross-examined him extensively. The defense offered no evidence. After the hearing, the court overruled the motion to suppress, and the jury trial commenced immediately. The first witness to testify was Officer McClain. He presented no new facts about the intoximeter procedure.

In this situation, we see no prejudice to the defendant and hold that any error in requiring a pretrial *Sensing* motion was harmless. *See* Tenn. R. App. P. 36(b). Due to Officer McClain's testifying at the opening of the trial and to the similarity of his pretrial and trial testimony, the pretrial hearing on the admissibility of the test results virtually equated to a *Cook*-type, in-trial hearing. The defendant had no evidence to present in the pretial hearing and had none to present a short time later when Officer McClain testified before the jury. All of his *Sensing* concerns emanated from Officer McClain's information, and these were apparently addressed in the pretrial hearing and ruling because no further objection was made to the introduction of the test results at trial. In this situation, we cannot see how the error prejudiced the defendant, and we regard it as harmless.

II. Destruction of Possible Exculpatory Evidence.

The defendant contends that the trial court violated his right to due process by overruling a motion to dismiss the charges on the basis that the state had destroyed possible exculpatory evidence. This issue has been addressed by both the United States and Tennessee Supreme Courts.

In *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984), the United States Supreme Court considered "whether the Fourteenth Amendment . . . demand[ed] that the State preserve potentially exculpatory evidence on behalf of defendants." *Id*. at 481, 104 S. Ct. at 2530. In *Trombetta*, the defendants were charged with driving while intoxicated. *Id*. at 482, 104 S. Ct. at 2530. They later moved to suppress intoxilyzer test results because the arresting officers failed to preserve their breath samples. *Id*. The Court concluded that the breath-analysis test results were admissible, noting that "California law enforcement officers do not ordinarily preserve breath samples." *Id*. at 482-83, 104 S. Ct. at 2530-31. The Court stated that although "criminal prosecutions must comport with prevailing notions of fundamental fairness[,]" the officers "did not destroy [the defendants'] breath samples in a calculated effort to circumvent . . . disclosure requirements." *Id*. at 485, 488, 104 S. Ct. at 2532, 2533. Instead, the officers acted ''in good faith and in accord with their normal practice.'" *Id*. at 488, 104 S. Ct. at 2533. The *Trombetta* Court also noted that the constitutional duty to preserve evidence must be limited to evidence whose "exculpatory value was apparent before the evidence was destroyed." The Court required that evidence also be unique, meaning that "the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. at 489, 104 S. Ct. at 2534.

In *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), the Tennessee Supreme Court considered a similar issue. In *Ferguson*, the police stopped a vehicle driven by Ferguson, observed appearances of intoxication, administered two field sobriety tests, suspected him of driving while under the influence, arrested him, and transported him to the police station. *Id.* at 914-15. There, Ferguson attempted further field sobriety tests, which were videotaped. *Id.* at 915. The officers subjected Ferguson to no objective testing, such as a breath test. Subsequently, the videotape of Ferguson's in-station field sobriety tests was inadvertently erased when it was "taped over." *Id*. at 914.

Our supreme court determined that the ultimate question to be resolved when addressing due process concerns involving the state's loss or destruction of evidence is "[w]hether a trial, conducted without the destroyed evidence, would be fundamentally fair[.]" *Id.* at 914 (footnote omitted). To make that determination, a lack of official bad faith is not determinative, and a reviewing court should employ a balancing test; it should determine:

> (1) whether the state had a duty to preserve the evidence, and if so,
>
> (2) whether the state should suffer adverse consequences by considering:

> (a) the degree of negligence involved;
>
> (b) the "significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available"; and
>
> (c) the "sufficiency of the other evidence used at trial to support the conviction."

See id. at 917.

The *Ferguson* court held that, although the police apparently had no duty originally to videotape the field sobriety tests performed at the station, once the tape had been made, the police had a duty to preserve it because "the videotape may have shed light on [Ferguson's] appearance and condition on the morning in question." *Id.* at 918. Based upon that legal conclusion and the general similarity of *Ferguson* to the present case, we conclude that, in the present case, the police had a duty to preserve the videotape, even though they had no duty to make the tape in the first place.

That said, we reject the claim that the loss or destruction of the videotape should result in a dismissal of the charges or any other sanction against the state. In *Ferguson*, the court held that no reversible error flowed from the "taping over" of the videotape. *Id*. The court determined that the police negligently erased a videotape that would have been of dubious significance because Ferguson had relied upon a defense that his physical impairments would have mimicked intoxication on a videotape of a field sobriety test. *Id.* Also, the high court determined that the officer's testimony about observing Ferguson's indicia of intoxication supplied sufficient evidence of guilt, independent of the videotaped field sobriety tests. *Id.*

In the present case, the videotape was apparently erased intentionally, but the "taping over" was in keeping with a procedure established in the police department to record a DUI suspect's refusal to comply with the implied consent law. Although the police intended to "tape over" the segment involving the defendant, they did not intend to erase the segment for purposes of destroying evidence. We view the degree of negligence as greater than that discerned in *Ferguson*, but here the negligence is manifest in the police department's failure to foresee that their voluntary taping procedure could result in evidence that it had a duty to preserve. Still, as in *Ferguson*, "the conduct was simple negligence, as distinguished from gross negligence." *Id.*

Next, we conclude that the lost evidence in the present case is even less significant than that in *Ferguson*, in which the police had videotaped Ferguson actually performing field sobriety tests. In the present case, no such activity was filmed. Essentially, not only are we uninformed about whether the videotape captured exculpatory images, but we cannot even surmise that it recorded images that were *capable* of reflecting upon the defendant's level of intoxication.

Finally, we observe that the state's other evidence of the defendant's intoxication was strong. The arresting officer testified to the defendant's furtive manner, slurred speech, odor of alcohol, and failed performance of two field sobriety tests. Furthermore, the defendant's intoxication was indicated by the 0.10 percent result on the intoximeter test. No such test was even performed in *Ferguson*.

On balance, therefore, we hold that, despite the destruction of the videotape, the defendant's trial was not fundamentally unfair. Thus, no reversible error results from the destruction of the videotape.

III. Jury Instructions on Missing Evidence.

The defendant claims that the trial court erred in instructing the jury on the issue of the missing videotape.

In *Ferguson*, our supreme court suggested a jury instruction on the issue of missing evidence:

> The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value*, so that an as yet unknown defendant may later examine the evidence.*
>
> If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are in issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

Ferguson, 2 S.W.3d at 917 n.11 (emphasis added). In the present case, the trial court gave the suggested *Ferguson* instruction except that the court omitted the portion that is italicized above. The defendant claims that this omission constitutes reversible error. We disagree.

The import of the *Ferguson* instruction, even as redacted in this case, is to benefit the defendant by instructing the jury, in effect, to give the benefit of the doubt about the missing evidence to the defendant. We fail to see how the elided portion significantly alters the meaning or the intent of the instruction. If eliding the instruction was error, it was harmless. *See* Tenn. R. App. P. 36(b).

IV. Sentencing.

In his final issue, the defendant claims that the trial court erred in denying probation or another form of alternative sentencing and in ordering consecutive sentencing.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. *See* Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Although in felony sentencing the trial court has an affirmative duty to state on the record, either orally or in writing, which enhancement and mitigating factors it found and its findings of fact, Tenn. Code Ann. §§ 40-35-209(c), -210(f) (2003), misdemeanor sentencing affords the sentencing court greater flexibility. *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). The misdemeanor sentencing statute only requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related rehabilitative programs." Tenn. Code Ann. § 40-35-302(d) (2003); *Troutman*, 979 S.W.2d at 274.

Tennessee Code Annotated section 40-35-103 defines the principles which should be considered when a court is contemplating sentences involving confinement for a particular defendant. Confinement is appropriate when

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or,
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Id. § 40-35-103(1)(A)-(C) (2003).

In the instant case, the trial court conducted a sentencing hearing, and the evidence introduced therein established that the defendant had three prior driving on a revoked license convictions, three driving with no driver's license convictions, two prior DUI convictions, a conviction of theft, and a Texas conviction of driving on a suspended license.

The defendant earned military medals and stars for two tours of duty and his service in Vietnam before being honorably discharged from the United States Army. The defendant testified that he has lung problems stemming from chronic bronchitis contracted during his service in Vietnam. He also testified that he suffers from a herniated disk resulting from being thrown from

a truck in a mine explosion in Vietnam. The defendant testified that he has had heart surgery and suffers from hypertension. He stated he had been disabled since 1979.

The trial court mitigated the sentences on the basis of the defendant's military record, his war-related injuries, and his poor health, but the court obviously was concerned about the defendant's extensive history of offenses involving a motor vehicle. On the conviction of DUI, third offense, the trial court sentenced the defendant to a term of confinement in the county jail of 11 months and 29 days, requiring that 75 percent of the sentence be served before the defendant becomes eligible for rehabilitative services. On the conviction of driving on a suspended license, the court suspended a sentence of 11 months and 29 days but imposed the latter sentence to run consecutively to the DUI, third offense sentence.

In our view, the defendant's prior record of committing offenses involving a motor vehicle supports the trial court's decision to order maximum sentences, 75 percent of service of the sentences, and consecutive alignment of the two sentences. *See* Tenn. Code Ann. §§ 40-35-114(2) (authorizing enhancement of sentence for previous history of criminal convictions or criminal behavior), -103(1)(a) (authorizing confinement when necessary to protect society by restraining defendant with long history of criminal conduct), & -115(b)(2) (authorizing consecutive sentencing for defendant with extensive criminal record). In his brief, the defendant argues that his criminal record contains only minor offenses and that he poses no danger to the public. We agree that all of his prior convictions are misdemeanors, but the offenses now under review are only misdemeanors. Moreover, his record shows a bent toward committing the same types of offenses that currently bring him before the court. Finally, although the defendant may have never injured anyone while committing motor vehicle offenses, it is beyond question that driving under the influence is an activity that generally poses great risk to the public. In short, we are unconvinced that the trial court's sentencing determinations are unsupported in the record.

V. Conclusion.

In the absence of reversible error, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE